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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN ARMOND VALENTINE,

Defendant and Appellant.

F059496

(Super. Ct. No. F09906861)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Levis, Judge. (Retired Judge of the Fresno Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Julia K. Freis, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Poochigian, J., and Detjen, J.

On December 6, 2009, appellant Kevin Armond Valentine (Valentine), took personal property from a Target store in Clovis.

On December 8, 2009, the district attorney filed a complaint charging Valentine with robbery (Pen. Code, § 211),<sup>1</sup> petty theft with a prior (§ 666), second degree burglary (§ 459/460, subd. (b)), and battery (§ 242). The complaint also charged Valentine with three prior prison term enhancements (§ 667.5, subd. (b)).

On December 29, 2009, Valentine pled no contest to petty theft with a prior in exchange for the dismissal of the remaining counts and enhancements and a maximum sentence of 28 months.

Valentine then waived time for sentencing and a probation report and the trial court sentenced him to an aggregate 28-month term, the mitigated term of 16 months on his petty theft with a prior conviction and a one year prior prison term enhancement. The court also awarded Valentine 36 days of presentence custody credit consisting of 24 days of actual custody credit and 12 days of conduct credit. The court calculated Valentine's presentence conduct credit on a one-for-two basis pursuant to the version of section 4019 then in effect. (See discussion *infra*.)

Valentine's appellate counsel filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Valentine has not responded to this court's invitation to submit additional briefing.

However, pursuant to this court's "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, (Supplemental Briefing Order) we deem raised the contention that Valentine is entitled to additional conduct

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

credit under a recent amendment to section 4019. We will conclude that Valentine is not entitled to additional conduct credit.

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In addition, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of section 4019 presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

As noted above, the court sentenced Valentine in December 2009, and calculated his conduct credit in accord with the version of section 4019 then in effect, which provided that conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019.) However, the Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its Supplemental Briefing Order, ordered that in pending appeals in which Valentine is arguably entitled to the benefit of the more generous conduct credit accrual provisions of the 2010 amendment to section 4019, we would deem raised, without additional briefing, the contention that prospective-only application of the amendment is contrary to the intent of the Legislature and violates equal protection

principles. We deem these contentions raised here.<sup>2</sup> As we explain below, they are without merit.

Under section 3, it is presumed that a statute does not operate retroactively “‘absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended [retroactive application]. [Citation.]’ [Citation.]” (*People v. Alford* (2007) 42 Cal.4th 749, 753.) The Legislature neither expressly declared, nor does it appear by “‘clear and compelling implication’” from any other factor(s), that it intended the amendment to operate retroactively. (*Id.* at p. 754.) Therefore, the amendment applies prospectively only.

We recognize that in *In re Estrada* (1965) 63 Cal.2d 740, our Supreme Court held that the amendatory statute at issue in that case, which reduced the punishment for a particular offense, applied retroactively. However, the factors upon which the court based its conclusion that the section 3 presumption was rebutted in that case do not apply to the amendment to section 4019.

We further conclude that prospective-only application of the amendment does not violate Valentine’s equal protection rights. *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) is inapposite because it involved a prior version of section 4019 that allowed presentence conduct credits to misdemeanants, but not felons. (*Id.* at p. 508.) In *Sage*, the California Supreme Court found that there was neither “a rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons.” (*Ibid.*) The purported equal protection violation at issue here is temporal, rather than based on defendant’s status as misdemeanor or felon.

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<sup>2</sup> We assume, without deciding, that Valentine is not required to register as a sex offender and has not suffered a prior conviction of a serious or violent felony.

One of section 4019's principal purposes, both as formerly written and as amended, is to motivate good conduct. Valentine and those like him who were sentenced prior to the effective date of the amendment cannot be further enticed to behave themselves during their presentence custody. The fact that defendant's conduct cannot be influenced retroactively provides a rational basis for the Legislature's implicit intent that the amendment only apply prospectively.

Because (1) the amendment evinces a legislative intent to increase the incentive for good conduct during presentence confinement and (2) it is impossible for such an incentive to affect behavior that has already occurred, prospective-only application is reasonably related to a legitimate public purpose. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 [legislative classification not touching on suspect class or fundamental right does not violate equal protection guarantee if it bears a rational relationship to a legitimate public purpose].)<sup>3</sup>

Further, following an independent review of the record we find that, with the exception of the section 4019 credit issue discussed above, no reasonably arguable factual or legal issues exist.

The judgment is affirmed.

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<sup>3</sup> The issue of whether the 2010 amendment to section 4019 applies retroactively is currently before the California Supreme Court in *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808, and *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.)